



OFFICE OF
CHIEF COUNSEL

DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
WASHINGTON, D.C. 20224

JUN 20 2000

CC:TEGE:EB:EC:EMadden
FREV-107252-00

MEMORANDUM FOR DIRECTOR, EXEMPT ORGANIZATIONS DIVISION

T:EO

Attn: Robert Charnoff (Room 6236) and Bob Fontenrose

FROM: Acting Assistant Chief Counsel
Employee Benefits, CC:TEGE:EB

SUBJECT: [REDACTED]
[REDACTED]

This memorandum responds to your request for assistance dated March 21, 2000, relating to the application [REDACTED]

[REDACTED] (Trust) for tax-exempt status as a voluntary employees' benefit association (VEBA) under section 501(c)(9) of the Internal Revenue Code.

As we indicated in our telephone discussion with Bob Fontenrose on Thursday, June 15, 2000, we believe Trust should not be granted tax-exempt status as a VEBA. We reach this conclusion even if Trust provides the additional information and argument specified in issues 1 and 2 below.

First, assuming you accept Trust's contention that the [REDACTED] employees are "casual employees,"¹ Delaware excludes from workers' compensation coverage "any employee whose employment is casual and not in the regular course of the trade, business, profession or occupation of the employer . . ." 19 Del. sec. 2701(9) (Michie's 1996). Thus, for an employee to be excluded from workers' compensation coverage under this provision, the employment of that employee must be both (1) casual and (2) not in the regular course of the trade, business, profession, or other occupation of the employer. If you accept the contention that the [REDACTED] employees meet the definition of casual employees, then the first

¹ Casual employment is defined as employment for not over 2 weeks or a total salary during the employment not to exceed \$100. 19 Del. sec. 2301(9) (Michie's 1996).

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prong of the test for exclusion is met. Based on the administrative file, however, Trust did not present any information or argument concerning the second prong of the exclusion. Specifically, Trust provided no information concerning whether the employment of the [REDACTED] employees is in the regular course of the trade, business, profession, or other occupation of the employer. If the employment of the [REDACTED] employees is in the regular course of the trade, business, profession, or other occupation of the employer (e.g., if the employer is an owner who is in the trade or business of [REDACTED]), then the employment of the [REDACTED] employees would apparently not meet the requirement for exclusion from workers' compensation coverage. In that situation, Rev. Rul. 74-18 would unquestionably apply, and Trust should not be granted tax-exempt status as a VEBA. [REDACTED]

[REDACTED]

[REDACTED]

Second, assuming Trust provides sufficient information to satisfy you that employment of backstretch employees is both casual and in the regular course of the trade, business, profession, or other occupation of the employer so that these employees fall within the exclusion, the fact that the special stabling requirements of the racetracks, including the provision of workers' compensation coverage, are enforced by the Commission suggests that the provision of workers' compensation coverage is a governmental requirement. [REDACTED]

[REDACTED]

Third, aside from the conclusions on these two issues, there is an argument that Rev. Rul. 74-18 should apply to this case. This is because Rev. Rul. 74-18 may be viewed as merely distinguishing between an employer who provides an employee benefit and an employer who satisfies its own preexisting externally imposed duty (which, under the facts of the revenue ruling, happened to be imposed by statute). Because this particular case appears to involve [REDACTED] who satisfy a preexisting duty imposed by [REDACTED] to provide workers' compensation coverage for [REDACTED] employees, it is similar to Rev. Rul. 74-18. Thus, Trust should not be granted tax-exempt status as a VEBA.

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If you have any questions regarding this memorandum, please contact Erinn Madden at 622-6060.

MARY OPPENHEIMER
Acting Assistant Chief Counsel

BY:

A handwritten signature in black ink, appearing to read 'MSH', is written over a horizontal line.

Mark Schwimmer
Senior Technical Reviewer
CC:TEGE:EB